

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DENNIS E. BURDETTE
Claimant

VS.

MENNONITE HOUSING REHAB SERV.
Respondent

AND

ACE PROPERTY & CASUALTY INS. CO.
Insurance Carrier

Docket No. **1,042,321**

ORDER

Respondent and its insurance carrier request review of the November 19, 2008 preliminary hearing Order entered by Administrative Law Judge John D. Clark.

ISSUES

It was undisputed claimant injured his low back while lifting at work on April 14, 2008, and that he provided respondent notice of the accident on May 3, 2008. After a preliminary hearing, the Administrative Law Judge (ALJ) found claimant had provided timely notice because there was just cause for his failure to provide notice within 10 days of the accidental injury and the notice provided on May 3, 2008, was within 75 days.¹

Respondent requests review of whether claimant provided timely notice of his work-related injury pursuant to K.S.A. 44-520. Respondent argues claimant failed to establish that there was just cause for his failure to provide notice of his accident within 10 days.

Claimant argues the ALJ's Order should be affirmed.

The sole issue raised on appeal is whether claimant gave respondent timely notice of accidental injury as required by K.S.A. 44-520.

¹ See K.S.A. 44-520.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Claimant testified he had a prior back surgery about 30 years ago consisting of a diskectomy and fusion. He was released without restrictions. Claimant continued to occasionally have problems with his back for which he would seek chiropractic treatment. And in March 2008 he had received some medication for back pain but at that time there was no pain into his legs.

Claimant began working as a foreman for respondent in August 2005. His job was to help individuals with the interior, woodwork and cabinet making process of building their own homes. On April 14, 2008, claimant was lifting a 70-pound air compressor when he experienced back and leg pain. He immediately left work and went to his personal physician's office where he met with a physician's assistant who provided claimant with an off-work slip. Claimant took the slip to his employer's office and gave it to his supervisor, Doug Bruggeman. He told Mr. Bruggeman that he was having back pain and could not work but he did not state he had suffered an accident at work that morning or that his back pain was due to an injury at work.

The physician assistant's note of the April 14, 2008 office visit states claimant complained of low back pain radiating into the right leg that had been bothering him the last two or three days again. It was further noted claimant had been into the office recently and his symptoms had resolved with a prescription for muscle relaxer. Finally, it was noted claimant had a history of low back problems and does some lifting and bending at his job.²

Claimant continued off work with the exception of going into work one day for approximately three or four hours when he measured a house for the trim work. An MRI was scheduled and in the interim claimant's back and especially his leg pain worsened to the point that he visited the emergency room. There was concern that the increased leg pain was due to a blood clot and unrelated to his ongoing back pain. On April 28, 2008, an MRI of claimant's lumbar spine was performed. Interestingly, the final report of the April 28, 2008, MRI has a notation, "Injury three weeks ago while lifting heavy object."³

The physician's assistant and claimant discussed the results of his MRI on May 2, 2008, which revealed degenerative changes in the spine, a right paracentral disk extrusion with migration of the disk downwards as well as a likely encroachment upon the exiting right L4 nerve root and the transiting right L5 nerve root. On May 3, 2008, claimant

² P.H. Trans., Cl. Ex. 1.

³ *Id.*

advised Doug Bruggeman that he had injured himself at work lifting the compressor on April 14, 2008.

Claimant was referred to a neurosurgeon with Abay Neuroscience. Dr. B. Theo Mellion reviewed claimant's medical records and performed an examination. The doctor recommended that claimant have back surgery.

Claimant testified that when he had the onset of pain on April 14, 2008, he thought he had suffered a strain that would resolve with some treatment as his intermittent episodes of back pain had responded in the past. Claimant noted that after a few chiropractic treatments his back pain would usually resolve and he would go back to his regular work.

Claimant further explained:

Q. Why did you wait from April 14th, 2008 until May 3rd, 2008 to report your injury as work-related?

A. I thought it was just an ongoing thing until the MRI.

Q. So based on that statement, was your pain any worse since April 14th of 2008 or was it the same as it was before April 14th, 2008?

A. The pain got worse after that, actually. I went to the emergency room on April the -- I don't know -- 18th, 19th, 17th, whatever.

Q. So it's fair to say we have no idea what an MRI from April 13th, 2008 would have looked like, correct?

A. From April the 13th?

Q. The day before your accident?

A. No. There wasn't one available to know.

Q. Okay. So what about the MRI convinced you that this was related to your work as opposed to just ongoing from your previous pain?

A. It showed a bulged disk.⁴

K.S.A. 44-520 governs workers compensation related injury notice requirements and directs that an injured employee notify his or her employer within 10 days of a work related injury unless the employer already has actual knowledge. However, if an injured worker

⁴ Burdette Depo. at 26-27.

has just cause for failure to provide notice within 10 days, he or she must in any event notify his or her employer within 75 days.⁵

The Board has noted that there are factors to consider in the determination whether just cause exists for the failure to provide notice within 10 days of a work-related injury: (1) the nature of the accident, including whether it occurred as a single traumatic event or developed gradually, (2) whether claimant was aware he sustained either an accident or injury on the job, (3) the nature and history of claimant's symptoms, and, (4) whether claimant was aware of the requirements of reporting a work-related accident and whether respondent had posted notice as required by K.A.R. 51-12-2.

When just cause is an issue, the above factors should be considered but each case must be determined on its own facts. This Board Member finds persuasive evidence establishing just cause for failing to report the accident within the 10-day period contained in K.S.A. 44-520.

In this case, claimant was aware that he had an onset of back and leg pain as a result of lifting a compressor at work. Because he had occasional episodes of back pain which would resolve after a few chiropractic treatments, the claimant did not tell his employer about the incident and sought treatment. During that treatment, as his leg pain worsened there was a question whether his increased leg pain was due to blood clots in his leg unrelated to his back pain. After the MRI confirmed disk encroachment and the Doppler exam on the legs revealed no blood clots, the claimant gave notice of his injury.

Although claimant concluded his onset of back pain was attributable to the incident on April 14, 2008, at the same time, he was also experiencing ongoing back problems which he would experience every few months. He noted that he would get minor treatment, the back pain would resolve and he could continue to work. And in this instance he treated his back pain in the same manner. But as his leg pain worsened there was a concern that he might have blood clots unrelated to his back pain and claimant understandably did not immediately relate that worsening to his lifting incident at work. Moreover, it is worth noting there is no evidence in the record that indicates whether respondent posted the notice required by K.A.R. 51-12-2. And claimant was never specifically asked if he was aware there was a requirement to report accidents within 10 days.

After considering the record as a whole, this Board Member finds that the ALJ did not err in finding claimant had established "just cause" for reporting his injury on May 3, 2008, more than 10 days after the date of accident but within the 75-day period set forth in K.S.A. 44-520. The nature of his injury and his history of intermittent back pain which resolved after a few days, as well as the question whether the increased leg pain was

⁵ K.S.A. 44-520.

caused by blood clots, justify a reasonable delay in reporting. The claimant was merely trying to continue working and the evidence suggests that to the extent claimant could continue to recover from back pain after minimal treatment, he would have continued to do so.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁶ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁷

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge John D. Clark dated November 19, 2008, is affirmed.

IT IS SO ORDERED.

Dated this 27th day of February 2009.

HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: Michael L. Snider, Attorney for Claimant
Matthew J. Schaefer, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge

⁶ K.S.A. 44-534a.

⁷ K.S.A. 2008 Supp. 44-555c(k).